MAY 1 1 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

WILLIE JOHNSON, JR.,	:	
	:	
Petitioner	:	
	:	
v.	:	Docket No.
	:	73-1543
RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,	:	
	:	
Respondents	:	

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

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May 15, 1974

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Preliminary Statement

The opinions of the Court below are set forth in Petitioner's Appendix. References to such Appendix are cited with the suffix

"Johnson" and Respondent REA Express, Inc. as "REA."

Questions Presented

REA will rely on Johnson's Questions Presented except for Questions 2b and 2c, for which it substitutes the following Questions:

2. Whether a person who claims that he has been discriminated against in employment on account of his race should be denied a hearing on the merits on any of the following grounds:

(b) As to his cause of action under Title VII, a suit dismissed without prejudice for failure to obtain counsel must be refiled within 30 days of the order of dismissal and the order need not be reopened, in the discretion of

the District Judge, under Rule 60(b), F. R. Civ. P.; and

(c) As to his causes of action under either statute, an order granting motions for summary judgment in an action seeking injunctive relief which was subsequently dismissed without prejudice for failure to obtain counsel has res judicata effect.

Statutory Provisions Involved

In addition to the statutes cited, the following statutes are also involved in this case:

1. United States Code, Title 28, Section 1292(a)(1)provides:

> "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District court for the District of the

Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injuctions, except where direct review may be had in the Supreme Court;..."

2. United States Code, Title 45, Section 153, First (i) provides:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the

appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Statement of the Case

REA intends to rely on Johnson's statement of the Case. However, REA wishes to clarify two areas of disagreement it has with Petitioner's Statement of the Case."

(1) There is no support in the record below for Petitioner's description of his attempts to contact counsel (Petition, pp. 8-9).

(2) In the February, 1972 letter from Mr. Caldwell to Judge Brown, Mr. Caldwell specifically stated he did not represent Mr. Johnson. Therefore, his letter could not have constituted a request for an extension of time made on Mr. Johnson's

behalf.

I

THERE IS NO REAL CONFLICT WITH OTHER COURT OF APPEALS DECISIONS ON ANY IMPORTANT MATTERS

The Petition for Certiorari states that the Court of Appeals' rejection of the view that the period of limitation applicable to an action brought under 42 U.S.C. §1981 is tolled by the filing of a complaint with the Equal Employment Opportunity Commission results in an important conflict between the circuits. On the contrary, there is only a minor conflict of dicta which is neither important to this case, which can be decided on an independent ground, nor to other cases.

In both Macklin v. Spector Freight

Systems, Inc., 478 F. 2d 979 (D.C. Cir. 1973) and Boudreaux v. Baton Rouge Marine Contracting Company, 437 F. 2d 1011 (5th Cir. 1971), the respective Courts of Appeals took the position that filing of an E.E.O.C. complaint did toll the statute of limitations under Section 1981. However, the statements were in footnotes to the decision to "give guidance to the District Court" (Macklin, supra, at 944) or "for the guidance of the court on remand" (Boudreaux, supra, at 1017). Moreover, in Macklin a holding of the Court is inconsistent with the view expressed in the footnote dictum. Thus, the Court held that exhaustion of administrative remedy under Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e-5c) is not required before a suit under Section 1981 may be brought, among

other reasons, because

> "...Section 1981 and Title VII, in truth, provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch to the breaking point courts' customary duty to accommodate allegedly conflicting legislation." 478 F. 2d at 996.

Moreover, the Court noted that among the wide differences were differences in statutes of limitations. If the schemes of the two statutes are so different that the difference in statutes of limitations did not require that one scheme be exhausted before another could be commenced, it seems unlikely that it would require tolling of one statute of limitations if the other was invoked. But until the D.C. Circuit carefully

considers the question in a case in which it is squarely posed, this Court cannot assume that it will follow the view expressed in the footnote. The Macklin Case was not such a case.

In any event, the inconsistency in dicta does not involve an important issue. In this case, the District Court dismissed the Section 1981 complaint also on the ground that plaintiff had failed to exhaust his administrative remedies. There is therefore an independent ground sustaining the decisions below, and the alleged conflict as circuits is therefore not important to this case. As for other cases, Title VII will always be available to any Plaintiff who files a complaint with the E.E.O.C. and could therefore take advantage of the tolling rule

Petitioner seeks to invoke. Hence, the effect of this rule will be negligible on most plaintiffs, except for the calculation of the amounts of damage. Such disputes over damages should not be the basis of undue allocation of this Court's time.

II

OTHER ISSUES RAISED BY PETITIONER DO NOT WARRANT EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY

A. The Interpretation of Tenn. Code §28-304

Johnson claims that Tenn. Code §28-304 which provides a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" is inapplicable to the complaint under Section 1981, or if applicable, violative of the U.S. Constitution.

Petitioner requests this Court to interpret a provision of state law upon which state courts have not interpreted. This Court has said:

> "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts...." Huddleston v. Dwyer, 322 U.S. 232,237 (1944).

There is no reason to vary this policy in this case.

Only upon interpretation of the statute by state courts can the constitutional questions raised by Petitioner be reached. In any event, the interpretation given to the statute by the Courts below raises no such questions. As the Court of Appeals noted, the statute applies to a wide

variety of personal tort actions and claims of malpractice. Placing civil rights violations in such category along with similar violations of law does not violate equal protection of the laws.

B. Exhaustion of Administrative Remedies Under the Railway Labor Act

Johnson claims that the district court erred in deciding that his claim under Section 1981 should be dismissed because of failure to exhaust administrative remedies under the Railway Labor Act. Petitioner cites Glover v. St. Louis & San Francisco R. Co., 393 U.S. 324 (1969) and Steele v. Louisville & Nashville Railroad Company, 323 U.S. 192 (1944).

In Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972), this Court held that a Plaintiff such as Mr. Johnson,

who complains of wrongful discharge, must utilize his Railway Labor Act remedies. Such remedies are set forth in Section 153, First (i) of the Railway Labor Act (45 U.S.C. §153, First (i)). Glover and Steele are not to the contrary. They involved cases of violation by a labor union of a duty of fair representation arising under the Railway Labor Act. In such cases, this Court has held it would be futile to exhaust administrative remedies. The standards, however, for liability under the Railway Labor Act are different than the standards under Section 1981. For one thing, under the Glover and Steele cases, the union is a necessary party who is alleged to have discriminated against its members. In such cases, arbitration of a Board chosen by the

union and company defendants might well be futile. But under Section 1981, where the union is not a necessary party and the plaintiff may succeed on the merits against his employer even if the union actively represents him, administrative remedies may not be futile, and the reasoning of Steele and Glover does not apply.

Johnson also contends that there exists a conflict in circuits. However, none of the cases cited except Macklin have anything to do with the requirement of exhausting employment arbitration remedies and Macklin only deals with that requirement in relation to the 1964 Civil Rights Act, not Section 1981. The fact that exhaustion of remedies under the Railway Labor Act may not be required for a complaint processed under the 1964 Civil Rights Act which (1) postdates the Railway Labor Act and (2) has extensive

administrative procedures of its own does not lead to the conclusion it is not required under Section 1981 which (1) predates the Railway Labor Act and (2) has no administrative procedures. This Court has ruled in Andrews that Railway Labor Act procedures must be exhausted, and Johnson has raised no issues which require modification of this ruling in this case.

C. Statute of Limitations

Johnson attacks the Courts below for failing to allow him more time to obtain counsel, and for failing to reopen the first action under Rule 60(b) of the Federal Rules of Civil Procedure.

What Johnson is asking would require this Court to delve into (1) questions of fact as to the notice Johnson received and on what date he was represented by counsel and (2) questions of whether the district judge abused his discretion in

failing to grant a motion that was never before him.

Johnson claims first that he did not have clear notice of the time limitation on the right to sue and therefore the 30 day time period should be deferred until he receives such notice (Petition, p. 20). According to Petitioner's Statement of Facts, he made numerous attempts to contact attorneys, and finally contacted a knowledgeable attorney by the end of the 30 day period. It certainly is a question of fact, for the District Court, to determine whether plaintiff had adequate notice. Certainly, Gates v. Georgia-Pacific Corp., 7 CCH EPD §9185 (9th Cir. 1974) does hold, as Petitioner claims, that where "the plaintiff has not had a clear notice of the time limitation on his right to

sue and has acted with all of the diligence and promptness which could be expected, it has been held that the limitations period does not start running until the plaintiff receives explicit notice." (Petition, p. 20). Instead, in that case, where the EEOC failed to mail the statutorily required notice to sue letter, the Court said:

> "We are convinced that, as a result of the Commission's error, appellee was confused, and, under the circumstances, acted with all of the diligence and promptness which could be expected. We restrict our holding to the facts of this case, and we express no opinion on the form of notice which might trigger the 30 day period under other circumstances." (7 CCH EPD ¶9185 at 6944)

Whether Petioner was confused is a question of fact this Court should not be called on to resolve.

Petitioner also claims that the Court should have treated Mr. Caldwell's letter of February 17 as the equivalent

of a motion for appointment of counsel. Once again this Court is called upon to make a finding of fact contrary to the finding of the Court of Appeals. For if the February 17 letter was "not an announcement that Caldwell was his counsel," (15a) as the Court of Appeals found, it would have been a violation of Johnson's rights to treat the letter as a motion by him -- only Johnson, not Mr. Caldwell, could request appointment of counsel.

Finally, Johnson claims that the district Court erred in failing to reopen the proceeding under Rule 60(b) of the Federal Rules of Civil Procedure.

In Klaprott v. United States, 335 U.S. 601 (1949), this Court reversed and remanded, for the only time, a failure of a U.S. District Court to set aside a prior judgment under Rule 60(b). The Court applied new provisions of amended Rule 60(b) which had been amended subsequent to the decisions of the Courts

below, which therefore did not have an opportunity to exercise their discretion as to the applicability of the amended rule. Moreover, the lower court has ordered denaturalization of a U. S. citizen, which this Court described as "more grave than consequences that flow from conviction for crimes....without evidence, a hearing, or the benefit of counsel, at a time when his Government was then holding the citizen in jail with no reasonable opportunity to defend his citizenship." 335 U.S. at 611, 615.

Short of such clearly extraordinary circumstances, this Court should not interfere with a district court's discretion in failing to reopen a proceeding under Rule 60(b), especially on its own motion. See Ackermann v. United States,

340 U.S. 173 (1950) for a refusal to reverse a failure to reopen a judgment where circumstances were less extraordinary than in Klaprott. Here, unlike Klaprott, the District Court had an opportunity to exercise its discretion on whether to invoke the Rule, it did have before it a motion challenging its procedure, the action was a civil proceeding without such serious adverse consequences to Johnson, Johnson had been free to act on his own behalf, or request the appointment of counsel, and Johnson had presumably had the advice of counsel for over three months, and for one month prior to time allowed to file a new complaint. In such circumstances, this Court should stay its hand.

D. Res Judicata

Petitioner finally claims that the

decision of Judge Brown granting summary judgment was not res judicata because it did not dispose of all claims against all defendants and was therefore not a final order under Rule 54(b) of the Federal Rules of Civil Procedure.

This claim ought not to be considered by this Court. The matters discussed heretofore constitute independent grounds which would dispose of the case, regardless of the disposition of the res judicata point. In any event, it is clear that an order for summary judgment as to some claims and parties is an order refusing an injunction and is therefore a final order under Section 1292(a)(1) of the Judicial Code (28 U.S.C. §1292(a)(1)). Glenmore v. Ahern, 276 F. 2d 525 (2d Cir. 1959), cert. den., Tri-Continental

Financial Corp. v. Glenmore, 362 U.S. 964 (1960); Build of Buffalo, Inc. v. Sedita, 441 F. 2d 284(2d Cir. 1971).

CONCLUSION

Certiorari should be denied and the petiton dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the above Brief upon Deborah M. Greenberg, 10 Columbus Circle, New York, New York 10019 and James L. Highsaw, 1015 18th Street, N.W., Washington, D. C., by first class mail.

Peter G. Wolfe